UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 14

ST. LOUIS CARDINALS, LLC

and **Case 14-CA-213219**

JOE BELL, an individual

RESPONDENT'S POST-HEARING BRIEF

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Pursuant to Section 102.42 of the National Labor Relations Board's Rules and Regulations, St. Louis Cardinals, LLC ("Respondent") files the following Post-Hearing Brief and respectfully requests dismissal of the above-captioned charge in its entirety.

I. STATEMENT OF THE CASE

Charging Party Joe Bell filed the instant Charge on January 18, 2018 on behalf of himself and fellow painters James Maxwell, Thomas Maxwell, and Eugene Kramer (collectively, the "Charging Parties"), alleging the Employer violated Section 8(a)(1) and (3) of the Act by discharging and/or refusing to recall the Charging Parties in retaliation for union activities. (GC-1(a)). On April 26, 2018, the General Counsel issued a Complaint on those allegations, as well as multiple purported statements allegedly violative of Section 8(a)(1) of the Act. (GC-1(e)).[1]

The parties participated in a Hearing in this matter on August 21 and 22, 2018, with the Hon. Judge Arthur Amchan presiding. Each of the parties presented evidence and witness testimony at the Hearing. Specifically, the General Counsel presented each of the four Charging Parties, as well as Union Business Manager Gregg Smith, and Respondent presented (i) Owner of

[1] The General Counsel subsequently amended the Complaint on July 26, 2018 to add an additional allegation of agency status. (GC-1(k)). All subsequent references to the "Complaint" incorporate the Amended Complaint.

Shamel Construction, Bob Shamel, (ii) Director of Facility, Security and Stadium Operations, Hosei Maruyama, and (iii) painting foreman, Patrick Barrett.

The evidence presented at the Hearing supports dismissal of the Charge for the following reasons:

(1) The Charging Parties are not entitled to protection under the Act regarding their internal Union charges because they pursued such charges with the unlawful object of causing the Union to violate Section 8(b)(1)(B) of the Act;

(2) Respondent could not have violated Section 8(a)(1) of the Act through any statements related to the Charging Parties' internal Union charges because those charges lacked protection; and

(3) Even assuming *arguendo* that the Charging Parties were entitled to the Act's protection in connection with their internal Union charges, Respondent would have taken the same actions in the absence of those charges.

II. FACTUAL BACKGROUND

A. Respondent's Operations and the Painting Foreman Position.

Respondent owns and operates a Major League Baseball team with a home ballpark of Busch Stadium (the "Stadium") in St. Louis, Missouri. (Tr. 283). As part of its Stadium maintenance activities, Respondent employs crews of painters each season. Painters' District Council #58 ("Union") represents those painters, and Respondent is a signatory to a multi-employer collective bargaining agreement ("CBA") with the Union. (GC-2). Over the decades, Respondent and the Union have enjoyed a history of peaceful and amicable relations. (Tr. 55). Respondent hires a separate crew for each baseball season. (Tr. 311-12). The CBA does not require Respondent to retain painters from season to season, but instead Section 6 - "Union Security" - only requires Respondent to employ Union members in good standing to perform unit work. (GC-2) (Tr. 179, 228, 111-12, 302, 311, 372-73).

Respondent's painting foreman holds the only full-time painting position at the Stadium. (Tr. 282). The foreman hires the crew each season, assigns and oversees all work, manages the

painting department budget, and is generally responsible for the interior and exterior aesthetics of the Stadium. (Tr. 279, 373). The foreman also adjusts both formal grievances, in accordance with Section 3 of the CBA, and day-to-day informal grievances regarding pay, scheduling, and other terms and conditions of employment. (GC-2) (R-9) (Tr. 279-80). Due to the prominence of the team within St. Louis, and the nature of the foreman position, area painters view the job as painting foreman for Respondent as a highly prestigious position. (Tr. 298-99).

Former foreman Billy Martin held the painting foreman position with Respondent for approximately 35 years before retiring at the end of the 2017 season. (Tr. 283). At that time, Respondent interviewed painters Patrick Barrett ("Barrett"), James Maxwell, and Thomas Maxwell (James' brother) to potentially succeed Martin in the painting foreman position. (Tr. 254, 299-300). James Maxwell expressed to Barrett that Maxwell "assumed that he was going to get [the job] because he was next in line." (Tr. 299). Maxwell added, "If I don't get it . . . I am going to get a lawyer and sue [Respondent] for age discrimination." (Tr. 300). However, Respondent's Director of Facility, Security and Stadium Operations, Hosei Maruyama ("Maruyama"), informed the candidates in November 2017 that Respondent would award the painting foreman position to Barrett. (Tr. 300-01).

B. The Charging Parties Sought to Use Internal Union Processes to Reverse Respondent's Painting Foreman Hiring Decision.

Within hours of receiving news of Respondent's decision to hire Barrett as the new painting foreman, James Maxwell informed Maruyama he intended to pursue internal Union charges against Barrett. (Tr. 256-57). He also emphatically told Maruyama, "I can't work for [Barrett]." (*Id.*).[2] The stated basis of Maxwell's charges would be that Barrett performed non-Union work

[2] Tom Maxwell later called Maruyama as well, recorded the call, and complained about Respondent's selection of Barrett. (GC-9). During this call, Maruyama, in reference to James Maxwell's comment about his unwillingness to

("side work") for Shamel Construction in the past. (GC-3). Maxwell, along with his brother Thomas, Eugene Kramer, and Joe Bell, formally filed these internal charges on December 8, 2018 (*Id*.). The Maxwell brothers and Kramer knew Barrett performed side work because they worked alongside him on those side jobs. (Tr. 206-07, 223, 245-51, 291-96). Likewise, Bell informed Barrett in November 2017 that Bell also performed side work, and even provided Barrett with his phone number in an apparent effort to facilitate future side work. (Tr. 133-34, 296-97). Despite their own side work, however, the Charging Parties never filed internal charges against one another or otherwise reported their own side work to the Union. (Tr. 224-25).

The internal Union charges specifically demanded Respondent remove Barrett as painting foreman. (GC-3). The Charging Parties clearly specified this outcome as the object of their charges on multiple other occasions as well. For example, James Maxwell (or, according to him, his wife) initiated a social media campaign asking Union members to pressure Respondent into firing Barrett. (R-7) (Tr. 79). All four Charging Parties stated during Barrett's February, 2018 internal Union trial that Barrett should be removed in favor of any one of them. (Tr. 111, 113, 141, 306). Furthermore, the Charging Parties appealed the Union's decision when it did not direct Barrett to resign as foreman, or to pay a more onerous fine. (Tr. 75, 227, 309). Finally, the Charging Parties admitted this object in their testimony. (Tr. 72-74, 137-38, 173-78, 183, 228).

Following both sides' presentation of evidence at the Union's January 3, 2018 Trial Board proceedings, its panel deliberated without the Charging Parties or Barrett in the room (Tr. 306). Ultimately, the Trial Board imposed a $15,000 fine on Barrett. (GC-5) (Tr. 306). The Union

work for Barrett, explained, "there are consequences for actions, and unfortunately, you know, this is what it came down to." (*Id*.) (Tr. 264). The General Counsel appears to base its Section 8(a)(1) statement allegations on Maruyama's statements during this call. *See* Compl. Para. 5. Additionally, the contents of this call confirmed that hiring the crew was solely Barrett's responsibility. (GC-9). It should also be noted that Thomas Maxwell recorded two calls with Maruyama, but the General Counsel only entered one recording into evidence. (Tr. 218-19).

demanded payment of $3,000 of that fine within 90 days, and held $12,000 in abeyance pending any further violation. (Tr. 307). The fine represented the largest fine ever recalled by Barrett, a 20-year Union veteran. (Tr. 285). This punishment also represented the first time the Union had punished anyone for side work since 1978. (Tr. 289-90). Barrett later borrowed against his home to pay the $3,000 immediately due. (Tr. 307). Had he not paid the fine, Barrett would have no longer been a Union member "in good standing," and thus considered unable to continue working for Respondent. (GC-2) (Tr. 179, 228, 111-12, 302, 311, 372-73).

Following the Trial Board proceedings and imposition of Barrett's fine, the Union and Respondent met at the Stadium on January 9, 2018 regarding Barrett's new duties and the internal charges. (Tr. 107-08, 309-11). Barrett participated in the meeting as Respondent's representative. During the meeting, the parties discussed the internal Union charges against Barrett, as well as the Union's desire for Barrett to consider using its hiring hall list to help hire his crew. (Tr. 310-11).[3] Union Business Agent Gregg Smith informed Respondent during the meeting that Barrett could retain his position, stating "as long as [he] paid [his] fine in that ninety days, [he] would not lose [his] card, and [he] would be a member in good standing." (Tr. 311). Barrett understood this statement to mean that he would lose his position if he did not pay the fine. (*Id*.).

Meanwhile, the Union also processed a grievance filed by the Charging Parties against Respondent regarding Barrett's promotion. (R-8). Respondent, through Barrett and Vice President of Stadium Operations Matt Gifford, denied the grievance. (R-9). Respondent maintained its denial at a February 21, 2018 Joint Trade Board meeting in which Barrett participated as Respondent's representative. (Tr. 334). The Joint Board unanimously denied the grievance on

[3] The hiring hall is non-exclusive. (GC-2, Sec. 7) (Tr. 100).

February 21, 2018, holding Respondent had not violated the CBA by promoting Barrett to foreman. (R-10).

C. Respondent Hired Its 2018 Season Crew Based on Barrett's Impressions of Work Performances and Availability.

Respondent hires its painting crews before each season on a rolling basis. (Tr. 312). The factors determining when it hires any particular painter include the weather, the projects requiring completion, and whether the team begins the season at home or on the road. (*Id*.). In 2018, the team began its season on the road. (*Id*.). The most common time for painters to receive calls offering them work is during the month of February, with offers to commence work between four and eight weeks before the home opener. (Tr. 312-13).

In 2018, Barrett began the hiring process by obtaining a copy of the hiring hall's out-of-work list from the Union. (R-11) (Tr. 314). Respondent, through Barrett, made its offers to painters for the 2018 seasons as follows:

1. Mark Ochs – second week of January. (Tr. 315).
2. Michael Burns – January. (*Id*.).
3. Thomas Maxwell – voicemails on February 5 and February 8. (Tr. 317).
4. Tim O'Neil – second week of February. (Tr. 315-16).
5. Bruce Noss - second week of February. (*Id*.).
6. Dave Sobkoviak - second week of February. (Tr. 316.).
7. Duane Oehman – second week of February. (Tr. 316-17).
8. Angie Ramshaw – apprenticeship program. (Tr. 317).

Thomas Maxwell, who had found another job, never responded to the voicemails regarding his offers. (Tr. 202-03, 317-18). Maxwell explained one reason he did not respond was his belief that the offer was "insincere." (Tr. 203, 229-30). When asked why he made Thomas Maxwell an

offer despite his participation in the internal Union charges, Barrett testified, "Tom is a good painter." (Tr. 321). Similarly, all of the other regular painters to whom Barrett tendered offers had demonstrated strong work abilities, either to Barrett directly or to others whom Barrett trusted. (Tr. 319-20). Additionally, Barrett understood each of those individuals to be available for work. (Tr. 320-21).

Barrett explained on direct testimony the internal Union charges filed by the Charging Parties contributed "a little bit" to his decisions not to offer work to James Maxwell, Eugene Kramer, and Joe Bell. (Tr. 311). However, as the offer to Thomas Maxwell demonstrates, other considerations ultimately controlled the final decision.

In contrast to Thomas Maxwell, Barrett did not offer work to James Maxwell and Eugene Kramer ("Kramer") because he assessed their work and work ethics as poor. For example, James Maxwell "would go missing quite a bit," would unprofessionally sit down while painting, was "sloppy," would sleep while on the clock, and had smoked marijuana during lunch breaks. (R-6(a)) (Tr. 321-24). Maxwell had also significantly compounded his deficiencies by "passionate[ly]" and "very adamant[ly]" telling Maruyama that he could not work with Barrett. (Tr. 256-57, 324-25). When Maxwell later attempted to revoke that comment by saying he would "bite his lip and try to make it work," Barrett, naturally, found that statement insufficient. (Tr. 257-58, 325).

Like James Maxwell, Barrett assessed Kramer's prior work as poor based on prior experiences. He explained Kramer performed substandard work, both at the Stadium and on a non-union side work job for Shamel Construction. (Tr. 295-96, 326). In fact, Kramer's work for Shamel was so deficient, it required Barrett and Shamel to spend "more time cleaning up and redoing that [than] had we just done it ourselves originally." (Tr. 326). Shamel himself confirmed

the need to "redo everything," and even refinish the building's hardwood floors due to Kramer's deficient work. (Tr. 250-51). Also like James Maxwell, Barrett witnessed Kramer using marijuana during the work day, with detrimental impacts on his work performance. (Tr. 327). Conversely, Barrett never witnessed any of the individuals who worked for Respondent during 2018 using marijuana. (*Id.*).[4]

Joe Bell, on the other hand, did not receive an offer because Barrett believed Bell was already working as a steel painter, his typical line of work, for one of Respondent's contractors at the Stadium, and thus unavailable to Respondent. (Tr. 327).[5] Barrett held this belief for quite straightforward reasons: Barrett witnessed him working for Respondent's steel painting contractor at the Stadium in mid-to-late January 2018, and his name did not appear on the Union's hiring hall list. (R-11) (Tr. 327-28). Bell himself testified he worked at Busch Stadium for that contractor "[a]ll the way up until February [2018]." (Tr. 125).

Importantly, the General Counsel presented no evidence contradicting Barrett's assessments of James Maxwell or Eugene Kramer's work performances or drug use, nor any evidence contradicting Joe Bell's steel painting work at Busch Stadium in mid-late January. As a result, that testimony stands unrebutted.

III. CREDIBILITY

Many of the facts in this case are undisputed, but where conflicts exist, Respondent's witnesses and Union Business Manager Gregg Smith should be credited over the Charging Parties. Respondent's witnesses and Smith testified clearly and honestly, and their demeanors were

[4] In one other similarity with James Maxwell, Kramer admitted he "probably" also said he could not work for Barrett. (Tr. 181).

[5] Steel painting differs from the painting performed by Barrett's crew because steel painters must often climb to work at heights, the work involves different materials, creates more dirt, and is less detail-oriented. (Tr. 298). Bell estimated approximately 90% of his work is steel painting work. (Tr. 131).

consistent on direct examination and cross-examination. The Charging Parties, in contrast, testified evasively and combatively on cross-examination. *See* (Tr. 52, 56-59, 62-69, 78) (James Maxwell); (Tr. 133-35, 140) (Joe Bell); (Tr. 214-15, 219-24) (Tom Maxwell); and (Tr. 167-74, 177-81, 183-84) (Eugene Kramer).

In particular, the Charging Parties alternated between admissions (Tr. 69-71, 121, 206-07, 216, 223) and denials (Tr. 64-65, 174, 222) of their prior side work, only to have Patrick Barrett (Tr. 291-97) and side work employer Robert Shamel himself (Tr. 245-51) unequivocally confirm their performance of side work based upon first-hand experiences. Barrett forthrightly even admitted on direct examination that the Charging Parties' internal Union charges factored "a little bit" into his decision not to offer work to James Maxwell, Eugene Kramer, or Joe Bell. (Tr. 321).[6] Additionally, while the Charging Parties all claim entitlements to the Board's remedies, including backpay and reinstatement, neither Smith, Barrett, Maruyama, nor Shamel possess any pecuniary interest whatsoever in the outcome of these proceedings. (Tr. 396-97).

IV. LEGAL ANALYSIS

A. The Charging Parties' Internal Union Charges Lacked the Protection of the Act Because They Sought to Cause a Violation of Section 8(b)(1)(B).

Section 8(b)(1)(B) of the Act states:

> It shall be an unfair labor practice for a labor organization or its agents (1) to restrain or coerce…(B) an employer in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances[.]"

29 U.S.C. 158(b)(1)(B).

[6] As discussed in further detail *supra* and *infra*, however, that consideration did not change Respondent's actions with regard to the Charging Parties. Barrett did offer work to Thomas Maxwell, who failed to respond, he possessed unfavorable views regarding James Maxwell's and Eugene Kramer's work and work ethics, and he believed Joe Bell to be employed in his usual steel painting line of work.

1. Respondent's Painting Foreman is a Section 8(b)(1)(B) Representative.

The General Counsel cannot seriously dispute Barrett's status as a Section 8(b)(1)(B) representative. As the Supreme Court has noted, supervisors with a formal role in contractual grievance adjustment processes clearly fall within the statutory definition. *NLRB v. IBEW Local 340*, 481 U.S. 573, 588 (1987); *see also Florida Power and Light Co. v. IBEW Local 641*, 417 U.S. 790 (1974). Here, Section 3 of **the CBA specifically identifies the painting foreman as Respondent's Step One grievance representative.** (GC-2). The painting foreman also serves as Respondent's formal grievance representative in practice. Barrett himself issued Respondent's response to the Charging Parties' grievance here. (R-9). He also participated in a meeting with the Union regarding his own hiring practices. (Tr. 107-08, 309-11).[7]

The Board also considers individuals holding contractual interpretation and administration duties through informal grievance resolution to be Section 8(b)(1)(B) representatives. *See Local No. 10*, 338 NLRB 701, 701 (2002) (relying on supervisor's "daily responsibilities" involving "wage rates, expenses, work hours, length of breaks, poor work performance, and safety issues…albeit at an informal level before such complaints become subject to the formal grievance procedure" to find him to be an 8(b)(1)(B) representative); *Sheet Metal Workers Local 104 (Simpson Sheet Metal*), 311 NLRB 758 (1993) (holding, "a supervisor's contractual interpretation function brings him within the 8(b)(1)(B) definition of 'representative'") *enf. denied* 64 F.3d 465 (9th Cir. 1995).[8] Here, both Barrett and his predecessor have adjusted informal grievances in the

[7] The General Counsel may point to the absence of prior grievances, or the fact Respondent saw no need to formally designate Barrett as a representative, to argue that Barrett does not constitute a Section 8(b)(1)(B) representative. Respondent notes its history of peaceful labor relations and industrial stability, as envisioned by the Act, does not deprive it of the Section 8(b)(1)(B) representative specified in the CBA and in practice. (Tr. 55). Furthermore, the General Counsel cannot identify who, if not Barrett, *does* perform Section 8(b)(1)(B) functions for Respondent.

normal course of their duties, including issues about wages, schedules, and other terms and conditions of employment. (Tr. 279-80). Even more directly, when Barrett met with the Union on January 9, 2018, the parties discussed his contract interpretation duties with regard to hiring, CBA Section 7, and Barrett's use of the Union's hiring hall list. (Tr. 107-08, 309-11). As a result, Barrett's status as a Section 8(b)(1)(B) representative is beyond dispute.

2. The Intended and Actual Outcomes of The Charging Parties' Internal Union Charges Constitute "Restraint or Coercion" under the Act.

The Board has long held the filing of internal union charges against a Section 8(b)(1)(B) representative constitutes "coercion" for purposes of that Section.

> "The conduct proscribed by Section 8(b)(1)(B) includes union discipline of a supervisor-member which may 'adversely affect' the manner in which the supervisor-member performs collective bargaining, grievance adjustment, or related activities on behalf of an employer."

Local No. 10, 338 NLRB at 701, *quoting San Francisco-Oakland Mailers' Local 18 (Northwest Publications)*, 172 NLRB 2173 (1968).

Here, the Charging Parties sought to cause the Union to engage in several acts adversely affecting Barrett's ability to perform his Section 8(b)(1)(B) duties. Importantly, the Charging Parties literally targeted Respondent's "selection" of Barrett as the painting foreman. A Section 8(b)(1)(B) representative cannot perform any 8(b)(1)(B) functions if prevented from serving in the role in the first place. Consequently, the facts here fall squarely within Section 8(b)(1)(B)'s purview, as shown by the statute's use of the word, "selection."

The internal Union charges unquestionably restrained and coerced Respondent. In fact, the internal charges caused Barrett to offer to resign from the painting foreman position (Tr. 302). Furthermore, the Union imposed a massive $15,000 fine on Barrett. (Tr. 306). The fine itself

[8] The Board has not acquiesced to the 9th Circuit's denial of enforcement in *Simpson*. *International Union of Elevator Constructors, Local 5*, 1996 WL 33321440, at *13 (ALJD 1996)

provides more than sufficient evidence of coercion, because all parties understand that a failure to pay fines results in removal. (Tr. 27, 111-12, 302-03, 311). These circumstances directly implicate Section 8(b)(1)(B)'s "selection" language. Consequently, the Charging Parties' unsuccessful attempts to remove Barrett, and their successful efforts to cause onerous fines, constituted proscribed Section 8(b)(1)(B) objects.

The Board finds Section 8(b)(1)(B) objects when the offending conduct relates to allegations of anti-union conduct (such as "side work") by the 8(b)(1)(B) representative. One such example arose in *Miscellaneous Drivers and Helpers Local 610*, 236 NLRB 1048 (1978), where a Section 8(b)(1)(B) representative stated during lunch at a saloon that, "all unions are crooks and thieves." *Id*. at 1049. Enraged, the union's President approached Respondent's Vice President of Manufacturing that afternoon and demanded, "I want this man fired[.]" *Id*. Similar to the Union's disavowals of Section 8(b)(1)(B) intent here, the *Local 610* union subsequently wrote a letter disavowing such intent. The Board nonetheless found a Section 8(b)(1)(B) violation.

Your Honor requested the parties to address whether a legal inability (under the *General Motors* line of cases) for the Union to cause Barrett's discharge for failing to pay a fine would impact the merits here. (Tr. 398). In fact, no such legal inability affects the issue of protection here. Section 8(b)(1)(B) makes it an unfair labor practice for a union to "restrain or coerce" an employer in furtherance of its proscribed object. Neither restraint nor coercion depends upon the legal ability to effectuate the proscribed object. In other words, if an individual threatens another person, "I'm going to burn down your house unless you do what I want," the wrongdoer could not defend himself against a blackmail allegation on the basis that, "It would have been illegal to burn down the house." In fact, as the Board well knows, parties to labor disputes all-too-often threaten and/or use illegal means to accomplish proscribed objects.

More importantly, all interested parties here, including the Charging Parties (Tr. 27, 74, 215, 228), Respondent's representatives (Tr. 302), Barrett (Tr. 302-03), and the Union itself (Tr. 111-12), believed the Union possessed the ability to force Barrett's removal for non-payment of a fine. That shared belief, coupled with the Charging Parties' efforts to turn that belief into a reality, demonstrates their coercive object. *See Auto Workers Local 1989 (Caterpillar Tractor*), 249 NLRB 922, 923 (1980) (finding filing of internal union charges and setting of trial date coercive, despite later withdrawal of charges prior to the hearing or imposition of fine).

3. The Charging Parties Pursued Internal Union Charges for the Purpose of Removing Barrett as Foreman.

The evidence leaves no doubt the purpose of the Charging Parties' internal Union charges was to force Respondent to remove Barrett as painting foreman. Most apparently, the only reason the Charging Parties knew of Barrett's side work in the first place is *they worked alongside him on those jobs*. (Tr. 206-07, 223, 245-51, 291-96). Their purpose consequently was not to curb impermissible side work. Furthermore, the internal charges specifically demanded Barrett step down as foreman (GC-3), and the Charging Parties reiterated that demand before the Trial Board. (Tr. 67, 73, 141, 306) (GC-5). Finally, the Charging Parties admitted this object in their testimony. (Tr. 72-74, 137-38, 173-78, 183, 228).

The timing of the charges demonstrates the Charging Parties' true motive as well. James Maxwell informed Respondent the charges would be forthcoming immediately after learning of Barrett's selection as the painting foreman. (Tr. 256-57). The Charging Parties decided to pursue these charges immediately after Barrett was selected for the foreman position, despite knowing of (and participating in) the side work for *years*. (Tr. 69-71, 121, 206-07, 216, 223-25, 241-45, 291-97). Finally, unsatisfied with the Union's imposition of thousands of dollars of fines on Barrett, the Charging Parties internally appealed the Trial Board's sentence. (Tr. 75, 227, 309).

Consequently, any claim that the Charging Parties pursued their internal Union charges for any reason other than a desire to remove Barrett as painting foreman is **pretextual**. The Board commonly rejects pretextual explanations for conduct that violates Section 8(b)(1)(B). *IBEW Local 77 (Bruce-Cadet)*, 289 NLRB 516, 519 (1988) (finding 8(b)(1)(B) violation because true reason for imposing fines was "punishment" for awarding work to another local on behalf of employer, not claimed reason of working outside jurisdiction); *Carpenters & Joiners, Local 1620*, 208 NLRB 94, 99 (1974) (finding internal union fines "a weak coverup; a pretext in an effort to hide the real reasons"). *Cf.* General Counsel's Advice Memorandum, *Elevator Constructors Union, Local 5 (Otis Elevator Co.)*, 4-CB-7499 (May 6, 1996) (finding fines lawful "because they were neither pretextual nor rooted in a contractual dispute").

The Charging Parties' true purpose and intent of removing Barrett as foreman renders their internal Union charges ineligible for the Act's protection. As a result, Respondent may rely on the charges as a lawful reason not to hire them for available work during the 2018 season.

4. <u>The Board's Decision in *Elevator Constructors* Does Not Preclude a Loss of Protection Based on Section 8(b)(1)(B) Because the Charging Parties Targeted Respondent's *Selection* of Its Representative, Rather Than Contract Interpretation Duties</u>.

The General Counsel may rely upon *Elevator Constructors (Otis Elevator Co.)*, 349 NLRB 583 (2007) to conclude Section 8(b)(1)(B) violations require internal union charges which explicitly refer to the representative's bargaining or grievance adjustment functions. In reality, *Elevator Constructors* addresses only a *derivative* type of Section 8(b)(1)(B) violation inapplicable here.

In *Elevator Constructors*, a supervisor-member Section 8(b)(1)(B) representative, Scott Cutler, worked as Respondent's mechanic-in-charge on a job. When the union learned of two contract violations present at the site, it fined Cutler $1,000, and held an additional $3,000 fine in

abeyance. The Board found the fines lawful because the contract violations did not relate to Cutler's exercise of his own Section 8(b)(1)(B) functions.

Elevator Constructors, and cases like it, address Section 8(b)(1)(B) violations regarding discipline of a supervisor-member's performance of contract interpretation functions. Importantly, however, these types of violations represent only *one type* of violation arising out of the statutory language. Indeed, the original, and most fundamental, Section 8(b)(1)(B) violations relate to an employer's "**selection** of his representatives" 29 U.S.C. 158(b)(1)(B) (emphasis added).

The Supreme Court provided a detailed, and directly on-point, explanation of Section 8(b)(1)(B)'s evolution in *NLRB v. Electrical Workers Local 340 (Royal Typewriter)*, 481 U.S. 573, 581-82 (1987) (emphasis added):

> For two decades after enactment, the Board construed § 8(b)(1)(B) to prohibit only union pressure applied directly to Respondent, and intended to compel it **to replace its chosen representative.** In 1968, however, the Board substantially extended § 8(b)(1)(B) in *San Francisco-Oakland Mailers' Union No. 18 (Northwest Publications, Inc.)*, 172 NLRB 2173 (*Oakland Mailers*). The NLRB held that a union violates § 8(b)(1)(B) when it disciplines an employer representative for the manner in which his or her § 8(b)(1)(B) duties are performed. The Board reasoned that the union "interfer[ed] with the [employer's] control over its representatives" by attempting "to compel Respondent's foremen to take pro-union positions in interpreting the collective bargaining agreement," because Respondent "would have to replace its foremen or face *de facto* nonrepresentation by them." *Id*. at 2173-2174. Hence, the Board concluded that union pressure designed to alter the manner in which an employer representative performs § 8(b)(1)(B) functions coerces Respondent in its selection of that § 8(b)(1)(B) representative.

This decision extended § 8(b)(1)(B) in two ways. First, it prohibited indirect coercion of an employer's selection of its grievance representative, which might result from internal union pressure on that representative. Second, it suggested that contract interpretation is so closely related to collective bargaining that it, too, is a § 8(b)(1)(B) activity. (*Id*.).

Here, Respondent relies on *Oakland Mailers* **only** to the extent that Section 8(b)(1)(B) violations can arise based on "indirect coercion" of Respondent through its grievance

representative (Barrett).[9] Otherwise, however, Respondent relies **on the original, pre-*Oakland Mailers*, plain language, view of Section 8(b)(1)(B) conduct**, which focuses on **"selection"** of the representative. Any contention by the General Counsel that the internal charges enjoyed protection because they did not relate to contract interpretation duties must fail, both as a matter of both law, and jurisprudential history.

Elevator Constructors pertains only to the expanded, "contract interpretation" view of Section 8(b)(1)(B). Respondent does not rely on that view. The Charging Parties' objects quite literally targeted Respondent's "selection" of its representative. The statute explicitly emphasizes the word "selection." Consequently, the Charging Parties' unlawful object of reversing Respondent's foreman selection decision establishes their loss of protection.

5. <u>The Charging Parties Cannot Gain the Act's Protection by Pursuing an Unlawful Object, Regardless of Whether They Constitute Agents of the Union.</u>

The absence of official roles within the Union does not extend the Act's protection to the Charging Parties' efforts to cause a violation of the Act. The Board determined, more than 40 years ago, that individual employees lose the Act's protection for intraunion activities seeking to use the union as a vehicle to cause a Section 8(b)(1)(B) violation. It explained:

> It is well settled that employees who engage in intraunion activity are protected from reprisal or discrimination by their employer. However, where such activity transcends purely internal union affairs and interferes with a supervisor-member's conduct in the course of representing the interests of his employer, the activity may be violative of Section 8(b)(1)(B) **and therefore lose its protection.**

Bovee and Crail Construction Co., 224 NLRB 509, 509 (1976) (emphasis added).

[9] Although the Charging Parties unsuccessfully sought Barrett's removal, it is noteworthy that one aspect of the result they ultimately obtained - $12,000 of a fine held in abeyance – could also affect Barrett's exercise of his contract interpretation duties in the future.

The *Bovee and Crail* Board directly addressed concerns about applying a Section of the Act aimed at institutional parties to individual employees. Drawing apt analogies to other unprotected individual actions, it responded:

> The thrust of our dissenting colleague's analysis appears to be that the Union must be considered only as an entity, and that its agents are not individually culpable as employees so long as they are assisting the Union. That is simply not the law. Employees, acting on behalf of the Union, may under certain circumstances lose the protection of the Act when they engage in slowdown activities, disparage their employer's product, or participate in a strike or in picketing in violation of a no-strike clause. Our dissenting colleague would, without legal justification, insulate the perpetrators of the unlawful act from the act itself. We cannot accept that reasoning.

Id. at 511 (emphasis added) (internal citations omitted).

See also Industrial First Inc., 197 NLRB 714 (1972) (finding discharge lawful because employer established the reason for the discharge was employee's threat to pursue internal union charges against foreman over work assignment dispute).

The Board, in two very recent cases, affirmed that individuals lose protection by acting in furtherance of objects proscribed by Section 8(b) of the Act**, even if those individuals do not constitute agents of their union**. In *Preferred Building Services, Inc.*, 366 NLRB No. 159 (Aug. 28, 2018), the Board upheld the employer's discharge of employees for picketing that held a proscribed Section 8(b)(4)(ii)(B) object. The unrepresented employees engaged in a day of picketing without the participation or authorization of any union. *Id.*, slip op. at n. 5 (noting a union organizer with whom the employees had consulted "did not participate in this [first day of] picketing" and "it is unclear" whether a representative of a local social justice organization participated). In other words, the employees lost protection due to their proscribed Section 8(b)(4) objects, even though they were not agents of any union, and even though Section 8(b)(4) of the Act, like Section 8(b)(1)(B), applies on its face to labor organization conduct. The offending

employees' unlawful objects were sufficient to cause a loss of protection (and lawful discharges), regarding of agency status.

Even more recently, the Board reached a similar conclusion in *Consolidated Communications*, 367 NLRB No. 7 (Oct. 2, 2018). There, a striking employee, without agency status or authorization from her union, followed the employer's truck in a dangerous manner, then blocked its progress, in an attempt to facilitate ambulatory picketing. The Board, drawing on the language of Section 8(b)(1)(A), found the employee's conduct "would reasonably tend to coerce or intimidate employees in the exercise of Section 7 rights, including the right to refrain from striking." Of course, an individual cannot violate Section 8(b)(1)(A). An individual can, however, lose the Act's protection by acting in furtherance of an 8(b)(1)(A) object, as *Consolidated Communications* confirms.

The General Counsel can articulate no reason why the Board would treat a non-agent employee's Section 8(b)(1)(B) objects any differently now than it did in *Bovee and Crail* in 1976, nor differently from its treatment of Section 8(b)(4) objects in *Preferred Building Services* on August 28, 2018, nor differently from its treatment of Section 8(b)(1)(A) objects in *Consolidated Communications* on October 2, 2018. As a result, the Charging Parties' proscribed objects of restraining and coercing Respondent in its selection of its painting foreman lack the protection of the Act, regardless of whether they acted as agents of the Union.

6. <u>The Charging Parties' Internal Union Charges Lack Protection as a Matter of National Labor Policy.</u>

The Supreme Court stated in *Southern S.S. Co. v. N.L.R.B.*, 316 U.S. 31, 47 (1942), "the Board has not been commissioned to effectuate the policies of the Labor Relations Act so single-mindedly that it may wholly ignore other and equally important Congressional objectives." In other words, while the pursuit of internal union charges typically constitutes protected activity,

such charges lose their protection when they contradict national labor policies. *See also Emporium Capwell Co. v. Western Addition Community Organization*, 420 U.S. 50 (1975) (examining relationship between Title VII and Section 7 rights).

The Court's *Southern S.S.* rationale applies here, except the conflicting national labor policy is contained *within the same statute under which the General Counsel alleges a violation*. The Charging Parties' internal Union charges directly challenged the Congressional intent expressed in Section 8(b)(1)(B) that each party in a labor relationship be permitted to select its own representatives without interference from its bargaining counterpart. Such actions cannot enjoy the Act's protections without infecting the statute with internal contradictions and practical deficiencies. Therefore, the Act does not protect the Charging Parties' internal charges here.

7. Due to The Absence of Protection, Respondent's Statements Regarding the Internal Union Charges Did Not Violate Section 8(a)(1) of the Act.

The Board explained in *Correctional Medical Services*, 349 NLRB 1198, 1203 (2007):

> Turning briefly to the 8(a)(1) allegations here, we note that the alleged threats and coercive interrogations occurred after the employees engaged in the unlawful and unprotected picketing. As the General Counsel appears to concede, if the employee conduct that was the subject of the threats and interrogations was itself unprotected, it was not unlawful for the Respondent to respond in that manner. We therefore find that the Respondent did not violate Section 8(a)(1) of the Act.

The same rationale applies here. The Charging Parties' internal Union charges did not enjoy the protection of the Act, and so Respondent's purported statements regarding those charges cannot violate Section 8(a)(1). As a result, Complaint Paragraphs 5(A)(i) and (iii), as well as 5(B), must be dismissed.[10]

[10] Counsel for the General Counsel has informed Respondent it intends to withdraw Complaint Paragraph 5(A)(ii).

B. Even Assuming *Arguendo* the Charging Parties' Internal Union Charges Were Eligible for the Act's Protection, Respondent Would Have Taken the Same Actions in the Absence of Those Charges.

Even assuming *arguendo* the Charging Parties' internal Union charges constituted protected activity, their allegations fail under either potential analytical framework for anti-union discrimination. Viewed as discharge allegations, the *Wright Line*, 251 NLRB 1083 (1980), *enf'd* 662 F.2d 899 (1st Cir. 1981), *cert. denied* 455 U.S. 989 (1982) framework applies. Viewed as refusal to hire allegations, the *FES (A Division of Thermo Power)*, 331 NLRB 9 (2000) framework applies.

Under *Wright Line*, even if the General Counsel could establish *prima facie* cases for each of the Charging Parties, Respondent would nevertheless prevail by showing it would have treated the Charging Parties in the same manner regardless of any protected activities. *NLRB v. Transportation Corp.*, 462 U.S. 393, 399–403 (1983). Under *FES*, the General Counsel must establish *prima facie* evidence of a discriminatory refusal to hire by showing that: (1) Respondent did not hire the Charging Parties; and (2) unlawful animus against their internal Union charges contributed to this decision. Even if the Charging Parties can establish this *prima facie* case, Respondent may defeat that showing by demonstrating that it would not have hired them even in the absence of protected activities.

The circumstances surrounding Respondent's treatment of each Charging Party for the 2018 season confirm it would have taken the same actions even absent any consideration of the internal Union charges. This conclusion rebuts any arguable *prima facie* case under both *Wright Line* and *FES*.

Most notably, Respondent *did* offer work to Thomas Maxwell, a good painter, and did so at the normal time for such offers, but Maxwell admittedly failed to respond. Consequently,

Thomas Maxwell did not suffer an adverse action. The Board will not find a violation of Section 8(a)(1) and (3) of the Act absent an adverse action. *Lancaster Fairfield Community Hospital*, 311 NLRB 401, 403-04 (1993).[11]

Furthermore, Respondent established unrebutted, legitimate, non-discriminatory reasons for its actions regarding James Maxwell, Eugene Kramer, and Joe Bell. James Maxwell, for example, performed sloppy and unprofessional work, slept on the job, smoked marijuana on lunch breaks, and informed Respondent he could not work for Barrett. Any one of these considerations, particularly Maxwell's sleeping, drug use, and "adamant" unwillingness to work for Barret (later only half-heartedly contradicted), would constitute compelling objective reasons for any employer to decline to employ an individual. Importantly, the 2018 season presented Barrett with his **first opportunity to hire**. Consequently, the General Counsel cannot claim Barrett tolerated any such behavior in the past. Even more importantly, all of this misconduct **stands unrebutted** on the record. The General Counsel could have called Maxwell to ask him whether Barrett's allegations of misconduct were true. It chose not to do so.

Eugene Kramer also performed poor work and smoked marijuana on lunch breaks. Barrett possessed first-hand experience about the consequences of Kramer's poor work, not only at Busch Stadium, but also for Shamel Construction. Furthermore, neutral third-party witness Bob Shamel confirmed the deficiencies in Kramer's work, and even added that his sloppiness resulted in a need to refinish the floors at the building. Again, these legitimate reasons stand **unrebutted** on the record.

[11] To the extent the General Counsel may seek to manufacture an adverse action based on the duration of employment offered to Thomas Maxwell, it must be noted that the General Counsel presented no evidence that the duration of employment offered to Thomas Maxwell differed from the normal duration of employment offered to part-time painters, including those offered to part-time employees during 2018. In the only testimony regarding these issues, Thomas Maxwell described on cross-examination past hiring practices consistent with the hiring process Barrett utilized in 2018. (Tr. 212-13).

Joe Bell, meanwhile, appeared, for all the world, to be employed in his typical steel painting line of work at the time when Barrett issued offers. By Bell's own recollection, he worked at Busch Stadium for a steel painting contractor into February 2018 (the same time when Barrett issued offers of work). Furthermore, Bell is a steel painter by trade, and performs approximately 90 percent of his work in that capacity. Since Joe Bell appeared to be employed – at the Stadium, no less – in his normal line of work, it would have made little sense for Barrett to offer him a job performing work for which he possesses less expertise. In fact, due to Barrett's overall responsibilities for the painted aesthetics of Busch Stadium, the only sensible choice was to allow an experienced steel painter to continue painting the Stadium's steel structures.

Wright Line and *FES prima facie* case rebuttal defenses typically ask the Court to engage in some degree of speculation about what the charged party would have done absent purportedly protected activities. Fortunately, however, Your Honor need not engage in any such speculation here. The evidence shows Respondent would not have offered 2018 work to James Maxwell, Eugene Kramer, or Joe Bell because **Respondent did offer work to Thomas Maxwell, who engaged in the same purportedly protected activities.** The General Counsel cannot overcome this crucial fact. The only difference between Thomas Maxwell on one hand, and James Maxwell, Eugene Kramer, and Joe Bell on the other, is that Barrett viewed Thomas Maxwell's work favorably and believed him to be available.

As a result, Respondent would rebut any *prima facie* case under *Wright Line* or *FES* because it would have taken the same actions absent the internal Union charges. "The mere fact that a *prima facie* case can be made is not grounds for a complaint where it is clear that a known defense will overwhelm the *prima facie* case." *Haynes-Trane Serv. Agency, Inc.*, 265 NLRB 958, 960 (1982).

V. CONCLUSION

Respondent has not violated the Act in any manner. The Charging Parties' internal Union charges lacked protection under the Act because they made those charges with the object of causing a violation of Section 8(b)(1)(B) of the Act (i.e., removing Barrett as Respondent's painting foreman). Due to that lack of protection, none of Respondent's statements regarding the Charging Parties' activities violated Section 8(a)(1) of the Act. Additionally, even assuming *arguendo* the Charging Parties' internal Union charges were eligible for the Act's protection, Respondent nonetheless did not violate the Act because it would have taken the same actions with regard to each Charging Party in the absence of the internal Union charges. For all of these reasons, Respondent respectfully requests dismissal of the Charge in its entirety.

Respectfully submitted this 12th day of October, 2018.

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CERTIFICATE OF SERVICE

I hereby certify that on this 12th day of October, 2018 I filed the foregoing RESPONDENT'S POST-HEARING BRIEF via the National Labor Relations Board's E-File system and served via Federal Express to the following parties:

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